

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
International Comparison and Consumer Survey)	
Requirements in the Broadband Data Improvement Act)	GN Docket No. 09-47
)	
A National Broadband Plan for Our Future)	GN Docket No. 09-51
)	
Inquiry Concerning the Deployment of Advanced)	
Telecommunications Capability to All Americans in a)	
Reasonable and Timely Fashion, and Possible Steps to)	GN Docket No. 09-137
Accelerate Such Deployment Pursuant to Section 706)	
Of the Telecommunications Act of 1996, as Amended)	
By the Broadband Data Improvement Act)	

COMMENTS OF COMPTTEL - NBP PUBLIC NOTICE # 19

COMPTTEL, through undersigned counsel, hereby submits its comments in response to the Commission’s above captioned Public Notice on the role of the universal service fund and intercarrier compensation in the National Broadband Plan.¹ The Commission has asked for “focused comment” on the existing universal service and intercarrier compensation policies and on possible options that would further the goal of making broadband available to all people in the U.S.² Consistent with the instructions in the Public Notice, COMPTTEL has adhered to the organization and structure of the questions set forth in the Notice.

As a preliminary and overarching matter, COMPTTEL would like to emphasize that the existing universal service fund is not sustainable, either from the contribution or the distribution perspective. Voice (but not broadband) subscribers are predicted to be assessed at a rate equal

¹ FCC Public Notice, “Comment Sought on the Role of the Universal Service Fund and Intercarrier Compensation in the National Broadband Plan” DA 09-2419 (rel. Nov. 13, 2009).

² *Id.*

to or exceeding 14% for the first quarter of 2010 to fund universal service. As the Commission stated last year:

We have seen unprecedented growth in the universal service fund, driven in significant part by increased support for competitive eligible telecommunications carriers. The growth of competition also has eroded the universal service contribution base as the prices for interstate and international services have dropped. . . . Although the Commission has attempted to address many of these issues on a case-by-case basis, it has become increasingly clear that piecemeal efforts to respond to these developments are inadequate – only comprehensive reform can address the challenges they present.³

The USF assessment essentially amounts to a tax on an essential service that must be paid by voice service subscribers. That USF tax is in addition to a host of other fees and surcharges, including the federal excise tax, state and local sales tax, E-911 fees, local number portability fees, right of way fees and TRS fees. It has gotten to the point where the “fees and surcharges” total on the telephone bills of residential subscribers approach the monthly service charge.

In its review of the High-Cost USF program last year, the Government Accountability Office (“GAO”) noted that in considering legislation to codify universal service in the Telecommunications Act of 1996, the Senate Commerce Committee anticipated that competition and new technologies would reduce or eliminate the need for universal service.⁴ Instead the opposite has happened. High cost fund payments have more than tripled since 1996, increasing from \$1.118 billion in 1996 to \$4.428 billion in 2008.⁵

³ *In the Matter of High-Cost Universal Service Support*, WC Docket No. 05-337, Order on Remand and Report and Order and Further Notice of Proposed Rulemaking, FCC 08-262 (rel. Nov. 5, 2008), at A-2, ¶2.

⁴ Government Accountability Office, *FCC Needs To Improve Performance Management And Strengthen Oversight of the High-Cost Program*, GAO-08-633 (June 2008) at 2 (“GAO Report”).

⁵ Federal State Joint Board on Universal Service, *2008 Universal Service Monitoring Report*, CC Docket No. 96-25. The GAO has determined that “[t]his significant growth has raised concerns about the program’s long-term sustainability, efficiency and effectiveness, as

It is not just the current size of the fund that needs immediate attention. The Commission's and USAC's administration and management of the fund are also in desperate need of repair. As the GAO pointed out, "12 years after the passage of the 1996 Act and after distributing over \$30 billion in high-cost program support, FCC has yet to develop specific performance goals and measures for the program," which limits its ability to make informed decisions about the program's future.⁶ In addition, the high cost program's internal control mechanisms are limited

and exhibit weaknesses that, collectively, hinder FCC's ability to assess the risk of noncompliance with program rules and ensure cost-effective use of program funds. Essentially, internal control mechanisms for the high-cost program focus on three areas: (1) carrier self-certification, (2) carrier audits, and (3) carrier data validation processes. Each of these processes has limitations. Carrier self-certification is the primary tool used to ensure that carriers use high-cost program support consistent with the program rules. Yet, the process does not have standardized requirements for achieving this objective since FCC and the states each impose different requirements. Additionally, carrier audits are the primary tool used in monitoring and overseeing carrier activities, yet these audits have been limited in number and the type of reported findings. FCC's Office of Inspector General, USAC and state regulatory commissions conduct carrier audits. But, since 2002, USAC has conducted audits of 17 carriers from a population of over 1,400 carriers. The carrier audits have yielded limited findings; according to USAC, it has been difficult to determine whether carriers are in compliance with FCC rules largely due to a lack of documentation available to substantiate the carriers' information. Lastly, the carrier data validation processes, which USAC and NECA conduct, are used to ensure the reliability of financial data underlying the program. However, these validation processes focus on the completeness of data reported by carriers and do not include processes for ensuring the accuracy of these data. These weaknesses limit FCC's ability to assess the risk of noncompliance with program rules. Further, these weaknesses could contribute to excessive program expenditures. For example, *these mechanisms are limited in assessing the cost-effectiveness of carriers, the accuracy of carriers' costs and line count data, and the appropriate use of high-cost program support, each of which could contribute to excessive program expenditures.*⁷

well as the adequacy of the oversight of carriers' need for and use of support." GAO Report at 14.

⁶ GAO Report at 5.

⁷ *Id.* at 5-6 (emphasis added).

The Commission's Inspector General also has expressed "concern about the possibilities for fraud, waste and abuse in the Commission's USF programs as administered by USAC."⁸ The Inspector General has most recently estimated that the erroneous payment rate for the high cost fund is a staggering 23.3 percent.⁹ This is in addition to the estimated erroneous payment rate for the Schools and Libraries program of 13.8 percent.¹⁰ Erroneous payments made from the Universal Service Fund amount to *billions* of dollars.¹¹ And even more disturbing, the estimated erroneous payment rate is increasing as time goes by. A year earlier, the estimated erroneous payment rate for the high cost fund was 16.6% percent and for the Schools and Libraries fund was 12.9 percent, graphically demonstrating that things are getting worse, not better.¹² Under these circumstances, it would be unconscionable to increase the size of the universal service fund before the serious problems with the administration and management of the fund are remedied.

Over a year ago, the GAO recommended that the Commission take the following actions to strengthen the management and oversight of the high-cost program:

⁸ FCC Office of Inspector General, Semiannual Report to Congress, October 1, 2008 – March 31, 2009 (July 30, 2009), at 19.

⁹ FCC Office of Inspector General, Semiannual Report to Congress, October 1, 2008 – March 31, 2009 (July 30, 2009), at 18-19. The high cost program is "at risk" of significant erroneous payments under the Improper Payment Information Act of 2002 ("IPIA"). The IPIA defines significant erroneous payments as annual erroneous payments in a program that exceeds 2.5 percent of the program's annual payments and \$10 million. All of the universal service programs are at risk of significant erroneous payments under the IPIA, but the high cost fund leads the pack. *Id.*

¹⁰ *Id.* at 19.

¹¹ *Id.*

¹² FCC Office of Inspector General, Semiannual Report to Congress, October 1, 2007 – March 31, 2008 (April 30, 2008), at 21.

1. To better ensure that the high-cost program supports the purpose it is intended to fill, FCC should first clearly define the specific long-term and short-term goals of the high-cost program and subsequently develop quantifiable measures that can be used by the Congress and FCC in determining the program's success in meeting its goals.
2. To ensure a robust internal control environment that supports performance-based management, FCC should identify areas of risk in its internal control environment and implement mechanisms that will help ensure compliance with program rules and produce cost-effective use of program funds.

The Commission has not yet acted to implement either of these recommendations which go to the very heart of its responsibilities to prudently manage and administer the billions of dollars in universal service funds that are collected and distributed each year. Without adequate oversight, it is no wonder that each of the USF programs is “at risk” under the IPIA.

There is no question that the current Commission has inherited a host of extremely challenging unresolved issues relating to the contribution and distribution of universal service funds. The Commission must take advantage of the opportunity before it to implement comprehensive USF reform. Continued inaction is not an option. As part of the National Broadband Plan, COMPTTEL urges the Commission to include a commitment to fix what is broken with the universal service fund.

1. Size of the Universal Service Fund

The Commission asks whether the relative size of the Universal Service Fund is “appropriate to achieve the objective of universalization of broadband” as well for comment on increasing or decreasing the size of one or more of the funds.¹³ In view of the unacceptably high rate of erroneous payments that currently beleaguer the fund, and the lack of progress made by the Commission in clearly defining the specific long-term and short-term goals of the support mechanisms, the Commission is not currently in a position to determine whether the relative size

¹³ FCC Public Notice at 1.

of funding for each of the programs is adequate. As the GAO observed, the lack of specific performance goals and measures for the high cost fund limits the Commission's ability to make informed decisions about the program's future and the weaknesses in the internal control mechanisms hinder the Commission's ability to ensure cost effective use of program funds and contribute to excessive program expenditures.¹⁴ The GAO has made similar observations about the Schools and Libraries Program.¹⁵ Before making any decisions about the appropriate size of any of the funding mechanisms or whether money should be shifted between them, the Commission must undertake a thorough review of each of the funding mechanisms, clearly define performance goals and measures for each of the funding mechanisms, and implement internal controls for each of the mechanisms that ensure the cost effective use of the funds distributed and that minimize waste, fraud and abuse.

2. Contribution Methodology

Over eight years ago, the Commission instituted a rulemaking proceeding requesting comment on whether and how to streamline the USF contribution methodology, including whether to replace the revenue-based assessment methodology with a flat-fee, such as a numbers

¹⁴ GAO Report at 5.

¹⁵ See, U.S. Government Accountability Office, Greater Involvement Needed by FCC in the Management and Oversight of the E-Rate Program, Report to the Chairman, Commission on Energy and Commerce, House of Representatives, GAO-05-151 (Feb. 2005) at 1 (FCC has not developed useful performance goals and measures for assessing and managing the E-rate program and its oversight of the program contains weaknesses that limit its ability to understand the scope of any waste, fraud and abuse within the program); and U.S. Government Accountability Office, Long-Term Strategic Vision Would Help Ensure Targeting of E-Rate Funds to Highest Priority Users, Report To Congressional Requesters, GAO-09-253 (Mar. 2009) at 1 (FCC does not have performance goals for its E-Rate program and its performance measures are inadequate; without them FCC is limited in its ability to efficiently identify and address problems with the E-Rate program and better target funding to highest priority uses).

or connections based, assessment methodology.¹⁶ Not only has the Commission taken no action to date, it is asking the same questions almost a decade later in connection with the National Broadband Plan -- both whether it should modify the existing revenues based methodology and how any such modifications would impact end users.¹⁷

Any recommendations on the USF contribution methodology that the Commission may make in the National Broadband Plan must be guided by the fundamental Universal Service Principle set forth in Section 254(b)(4) of the Communications Act and the language in Section 254(d). Section 254(b)(4) states that all providers of telecommunications services should make an equitable and nondiscriminatory contribution to the preservation and advancement of universal service. Section 254(d) states that every telecommunications carrier that provides interstate services shall contribute on an equitable, and nondiscriminatory, basis to the specific, predictable and sufficient mechanisms established by the Commission to preserve and advance universal service and that any other provider of interstate telecommunications may be required to contribute to the preservation and advancement of universal service if the public interest so requires.

The Commission's decisions over the last several years that have classified Internet access services, including DSL and cable modem service,¹⁸ as information services have removed the

¹⁶ *Federal-State Joint Board on Universal Service, 1998 Biennial Regulatory Review – Streamlined Carrier Reporting Requirements Associated with Administration of Telecommunications Relay Service, North American Numbering Plan, Local Number Portability, and Universal Service Support Mechanisms, Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Administration of the North American Numbering Plan and North American Numbering Plan Cost Recovery Contribution Factor and Fund Size, Number Resource Optimization, Telephone Number Portability*, CC Docket Nos. 96-45, Notice of Proposed Rulemaking, 16 FCC Rcd 9892 (2001).

¹⁷ FCC Public Notice at 2.

revenues from those services from the USF contribution base, putting more pressure on the contributions that have to be extracted from voice customers. In reclassifying wireline broadband Internet access service as an information service, the Commission required providers to maintain their current universal service contribution levels attributable to the provision of broadband Internet access service for nine months or until the Commission adopted new contribution rules, whichever occurred first.¹⁹ Significantly, the Commission stated that the transition period was necessary “to preserve existing levels of universal service funding, and prevent a precipitous drop in fund levels while we consider reform of the system of universal service in the *Universal Service Contribution Methodology* proceeding.”²⁰

The Commission has not yet completed reform of the system of universal service, but has instead, continued to apply patches on a piece meal basis. Moreover, the Commission’s reluctance to define interconnected VoIP or over the top VoIP services as either information services or telecommunications services has created confusion for carriers and inconsistency in reporting (or not reporting) revenues from these services to the Commission and USAC. While the Commission started requiring interconnected VoIP providers to contribute to the universal service fund and established a safe harbor assumption that 64.9 percent of interconnected VoIP revenues were interstate over three years ago, this too was to be an interim bandaid for the

¹⁸ *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, CC Docket No. 02-33, Report and Order and Notice of Proposed Rulemaking, FCC 05-150 (rel. Sep. 23, 2005); *Inquiry Concerning High Speed Access to the Internet Over Cable and Other Facilities*, GN Docket No. 00-185, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798 (2002).

¹⁹ *In the Matter of Appropriate Framework for Broadband Access to the Internet Over Wireline Facilities*, at ¶113.

²⁰ *Id.*

shrinking USF contribution base until the Commission had an opportunity to implement comprehensive reform.²¹ The industry is still waiting for comprehensive reform.

In the meantime, as the Commission noted last week, carriers are converting their networks from circuit-switched to IP-enabled:

Broadband itself is a leading indicator of the major transitions in communications technology and services provided by incumbents and new entrants into virtually every segment of the communications industry. No longer is broadband simply another service – it is a growing platform over which the consumers accesses a multitude of services, including voice, data, and video in an integrated way across applications and providers.²²

As networks become more IP-enabled, the potential for confusion with respect to whether a particular broadband voice or data service is a telecommunications service that must contribute to the universal service fund or an information service that is not subject to contribution, will likely increase. In an effort to relieve the current strain on the universal service fund pending comprehensive reform, the Commission should exercise its authority under Section 254(d) of the Act, and Title I if necessary, to require all providers of services that touch or access the PSTN to contribute to the universal service fund. Doing so will ameliorate the current inequity where voice subscribers are footing far more than their fair share of the bill to bring not only voice, but also broadband, service to all people of the United States.

4. Impact of Changes in Current Revenue Flows

To the extent that the Commission plans to recommend comprehensive changes to the intercarrier compensation system currently in place, COMPTTEL urges the Commission to phase in any such changes over a period of years and build in an adequate transition period such that

²¹ *In the Matter of Universal Service Contribution Methodology*, WC Docket No. 06-122, Report and Order and Notice of Proposed Rulemaking, FCC 06-94 (rel. June 27, 2006).

²² FCC Public Notice, “Comment Sought on Transition From Circuit-Switched Network To All IP-Network,” DA 09-2517 (rel. Dec. 1, 2009).

carriers have sufficient time to make the appropriate changes to their billing, financial and forecasting systems without the undue sticker shock that would result from a flash cut.

While any changes to the intercarrier compensation rules made in the pending rulemaking proceedings²³ would be applicable on a prospective basis only, the Commission should also make clear that any clarifying interpretations of the existing intercarrier compensation rules are to be applied on a prospective basis only as well. One issue that has bedeviled the industry for far too long is whether and how the ESP exemption from access charges applies to VoIP and other IP-PSTN traffic.²⁴ In the absence of direction from the Commission, carriers have in good faith treated such traffic in different ways for intercarrier compensation purposes.²⁵ In order to avoid a potential tidal wave of litigation, the Commission should specifically include in any decision it may make or interpretation it may issue with respect to the applicability of the ESP exemption to VoIP or other IP-PSTN traffic a statement that the decision/interpretation applies on a prospective basis only.

²³ See, *Developing a Unified Intercarrier Compensation Regime*, CC Docket No. 01-92; *Intercarrier Compensation for ISP-Bound Traffic*, CC Docket No. 99-68; *IP-Enabled Services*, WC Docket No. 04-36.

²⁴ See, e.g., Petition of Feature Group IP For Forbearance From Section 251(g) of the Communications Act and Sections 71.501(b)(1) and 69.5(b) of the Commission's Rules, WC Docket No. 07-256 (filed Oct. 23, 2007); Petition of Embarq Operating Companies For Forbearance From Enforcement of Section 69.5(a) of the Commission's Rules, Section 251(b) of the Communications Act and Commission Orders on the ESP Exemption, WC Docket No. 08-8 (filed Jan. 11, 2008); and Petition of Frontier Local Operating Companies For Forbearance From Enforcement of Section 69.5(a) of the Commission's Rules, Section 251(b) of the Communications Act and Commission Orders on the ESP Exemption, WC Docket No. 08-205 (filed Sept. 25, 2008); Petition of AT&T, Inc. For Interim Declaratory Ruling and Limited Waiver, WC Docket No. 08-152 (filed July 23, 2008).

²⁵ *Id.*

5. Competitive Landscape

(d). What would be the impact of requiring entities that accept universal service support to offer the underlying transmission on a common carrier basis?

The impact of requiring entities that accept universal service support to offer the underlying transmission on a common carrier basis would be to promote competition in the provision of broadband service. To the extent it is not economically feasible for new entrants to overbuild existing networks in high cost areas, requiring universal service support recipients to provide access on a common carrier basis to the underlying transmission facilities will create the opportunity for competing broadband service providers and ISPs to offer customers a choice of providers and services. Competition is the most effective tool for bringing retail prices down. Increased affordability cannot help but lead to increased subscribership.

6. High-Cost Funding Oversight

The Commission asks what appropriate oversight and accountability mechanisms would be needed to minimize waste, fraud and abuse and to ensure that recipients of any broadband high-cost support use the funds as envisioned.²⁶ COMPTTEL submits that as a first step, the Commission should again review the assessments that both the GAO and the Office of Management and Budget (“OMB”)²⁷ have conducted of the high cost fund over the last several years and actually implement the changes and improvements that these agencies have recommended to establish performance measures and goals and improve internal controls. Only by doing so will the Commission and those with oversight responsibilities be able to determine whether the enormous expenditures made by the high cost fund on an annual basis are actually

²⁶ FCC Public Notice at 6.

²⁷ Office of Management and Budget, Program Assessment Universal Service Fund High Cost, available at <http://www.whitehouse.gov/omb/expectmore/summary/10004451.2005.html>.

being used for their intended purposes, that any and all expenditures are cost-effectively made, that the Commission is effectively monitoring and enforcing compliance with its rules and that erroneous payments are kept to a minimum. The Commission must also hold carriers receiving universal service funds strictly accountable for how those funds are spent and require the return of any funds whose use cannot be properly documented for an appropriate purpose.

Respectfully submitted,

/s/

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